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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF ARIZONA
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12 FINOVA Capital Corporation,)
13 Plaintiff,) No. CIV 02-1277-PHX RCB
14 Vs.) O R D E R
15 Richard A. Arledge, Inc.,)
16 d/b/a Arledge Motor Co.,)
17 et al.,)
18 Defendants.)
19

20 This action was commenced on July 10, 2002, when Plaintiff
21 FINOVA Capital Corporation ("FINOVA") filed a complaint against
22 Defendants Richard A. Arledge, Inc., d/b/a Arledge Motor Co.
23 ("AMC"), et al., in this matter. Complt. (doc. 1). Thereafter, on
24 October 4, 2002, Defendants filed their Answer and Counterclaim.
25 (doc. 42). FINOVA asserts breach of contract claims against
26 Defendants and seeks recovery of a deficiency owed by AMC under a
27 loan contract and by the Arledges as the guarantors of such loan
28 contract. Pretrial Order (doc. 231). AMC and the Arledges rely
upon the following affirmative defenses: Waiver, Release, Estoppel,

1 Prior breach, Excuse of Performance, Unclean hands, Set off,
2 Payment, Accord and satisfaction, Impairment of collateral, Failure
3 of consideration, Usury, Unconscionability, Fraud, and Prior Course
4 of Dealing and Course of Performance. Id. Furthermore, AMC and
5 the Arledges contend that FINOVA committed a prior material breach
6 of the loan contract, which excused their further performance and
7 was a producing cause of their damages. Id.

8 On April 30, 2004, FINOVA filed a motion for summary judgment
9 on all the matters in this case. (doc. 133). That same day,
10 Defendants filed a cross-motion for summary judgment. (doc. 135).
11 On August 25, 2004, the Court entered an order granting partial
12 summary judgment in this action in favor of Plaintiff. Order (doc.
13 167). However, the Court noted that a determination as to who was
14 responsible for monitoring the "minimum net cash flow covenant"
15 ("MNCFC") remained at issue. Id. at 29.

16 On April 11 through April 18, 2006, a bench trial was
17 conducted on the remaining issues in this matter. Min. Entry (doc.
18 257). At the bench trial, documentary evidence was presented and
19 the court heard testimony from witnesses for both parties. Having
20 reviewed the evidence presented, the court now makes its findings
21 of fact and conclusions of law.

22 **I. FINDINGS OF FACT**

23 FINOVA is a Delaware corporation, with its principal place of
24 business in Maricopa County, Arizona. AMC is a Texas corporation
25 with its principal place of business located in Dallas County,
26 Texas. Richard A. Arledge ("Arledge") and Peggy L. Arledge are
27 husband and wife and reside in Collin County, Texas. The amount in
28 controversy in this action, exclusive of interest and costs, is in

1 excess of \$75,000.

2 FINOVA is a commercial finance company, which, at the time of
3 the events in question, provided commercial financing to companies
4 like AMC. At the time of the events in question, AMC was in the
5 business of selling and leasing (and financing the sale and leasing
6 of) used automobiles. Arledge is the president of AMC.

7 From June 17, 1992 to December 14, 1995, AMC obtained
8 financing from TransAmerica, a commercial finance company. On or
9 about October 17, 1995, TransAmerica notified AMC that it was in
10 violation of the "interest coverage ratio" contained in AMC's loan
11 documents with TransAmerica. The "interest coverage ratio" was not
12 curable. Sometime in October 1995, Arledge contacted Steve
13 Cammack, the former Credit Division Manager for TransAmerica and
14 the Division Manager of the Rediscount division for FINOVA, at all
15 relevant times in this litigation to inquire if FINOVA would be
16 able to extend financing to AMC. Cammack was involved with the
17 negotiations of the loan, loan terms, loan agreements and documents
18 with AMC.

19 **A. Agreements and Contracts Between FINOVA and Defendants**

20 On December 14, 1995, FINOVA, as lender, and AMC, as borrower,
21 executed and delivered: (a) a Loan and Security Agreement and a
22 Schedule to the Loan and Security Agreement dated December 14, 1995
23 (collectively, the "Original Loan Agreement"); and (b) a Promissory
24 Note (the "Original Note") (collectively the "Initial Loan
25 Documents"). The Initial Loan Documents provided AMC a revolving
26 line of credit of \$3,000,000. Pursuant to and contemporaneously
27 with the execution of the Initial Loan Documents, the Arledges
28 executed and delivered to FINOVA a document entitled "Guaranty

(Continuing/Unlimited)" (the "Guaranty"), which guaranteed to FINOVA the payment and performance by AMC of all its loan obligations under the Initial Loan Documents. The Original Loan Agreement contained a "net income" covenant, which was designed to determine whether AMC had a positive net income on its income statements.

On October 21, 1999, AMC executed a document entitled "Fourth Amended and Restated Promissory Note" in the principal amount of \$10,000,000, which superceded the Original Note. At that time, the Original Loan Agreement was amended by the Ninth Amended and Restated Schedule to the Loan and Security Agreement (the "Ninth Amendment"). The Ninth Amendment introduced, in place of the "net income" covenant, the "minimum net cash flow covenant" ("MNCFC") to the Loan Agreement. The MNCFC was retained in the "Tenth Amended and Restated Schedule to Loan and Security Agreement" (the "Loan Agreement"), which was acknowledged by the Arledges as guarantors.

The MNCFC is set forth in Section 6.2(K) of the Loan Agreement, which requires that AMC not "[a]llow the Net Cash Flow to be less than One Dollar (\$1.00) for the period of determination," with the term "Net Cash Flow" defined under Section 1.40 of the Loan Agreement as follows:

NET CASH FLOW. The term "Net Cash Flow" shall mean, for the twelve (12) month period immediately preceding any date of determination, as reflected on the financial statements of Borrower supplied to Lender pursuant to Section 4.4 hereof, the sum of the following: (i) all cash receipts, including, but not limited to, collections of Receivables and Leases, down payments, trade-ins on sales and repossession recoveries, less (ii) all cash expenses, including cost of goods sold (with the cost of goods sold with respect to the Leases to be calculated at Cost Ratio multiplied by the total gross liquidations of Receivables and

1 Leases, including residual recovery from the
2 Leases, for the period of determination).

3 (Exbt. 108). AMC was responsible for providing FINOVA with the
4 documents and information requested by FINOVA to determine the Net
5 Cash Flow.

6 Pursuant to the Loan Agreement, FINOVA agreed to provide AMC
7 with a loan facility not to exceed \$10,000,000 for the financing of
8 (1) AMC's purchase of motor vehicle inventory and (2) loans and
9 leases arising from the marketing of such inventory. Section
10 2.3(C) of the Loan Agreement established that the term of the loan
11 was due to expire on September 30, 2004.

12 Under Section 2.2 of the Loan Agreement, interest was to
13 accrue on the principal balance of the amounts advanced under the
14 Loan Agreement at the "Stated Interest Rate," which is equal to
15 three percent (3%) in excess of:

16 ...the "Prime" rate publically announced by
17 Citibank N.A., New York, New York (or such other
18 "money center" bank as [FINOVA], in its sole
19 discretion, may select from time to time, but
20 shall not be more than the highest rate of the
21 five largest banks in the Continental United
States as their respective corporate base,
reference, prime or similar benchmark rate),
provided however, that such rate may not be the
lowest rate charged to such bank's customers.

22 (Exbts. 102, 108). AMC was obligated under Section 2.3 of the Loan
23 Agreement to make monthly payments of accrued interest to FINOVA.

24 In addition to the obligations of maintaining a positive cash
25 flow and making monthly interest payments, AMC had numerous other
26 obligations under the Loan Agreement, including the obligation to
27 make principal payments of all loan "overadvances." Section 2.5 of
28 the Loan Agreement provides that AMC was required to immediately

1 cure any loan overadvance (i.e., the amount by which the loan
2 balance exceeds the limits under the Loan Agreement) by making full
3 payment of the amount of such overadvance.

4 Section 1.10 of the Loan Agreement defines "Default" as "an
5 event which with the passage of time or notice or both would
6 constitute an 'Event of Default' (as defined in Section 7.1)."

7 Section 7.1 of the Loan Agreement sets forth numerous events that
8 would constitute Events of Default, including those set forth in
9 Section 7.1(A) and Section 7.1(B). Section 7.1(A) addresses

10 monetary events, providing that an Event of Default shall arise
11 "[i]f any payment of principal or interest or any other amount due
12 Lender is not paid within five (5) days after the same shall be due
13 and payable." Section 7.1(B), referring to non-monetary events,
14 provides that an Event of Default arises:

15 If [AMC] or [Arledge] fails or neglects to
16 perform, keep or observe any of the terms,
17 provisions, conditions or covenants, contained in
18 this Agreement, any of the other Loan Documents or
19 any other agreement or document executed in
20 connection with the transactions contemplated by
21 this Agreement or if any representation, warranty
22 or certification made by [AMC] herein or in any
23 certificate or other writing delivered pursuant
24 hereto shall prove to be untrue in any material
25 respect as of the date upon which the same was
26 made or at any time thereafter, and the same is
27 not cured to Lender's satisfaction within ten (10)
28 days after Lender has given written notice to
[AMC] identifying such default.

(Exbt. 102). Pursuant to Section 2.9(i) of the Loan Agreement,
FINOVA was not obligated to make loan advances to AMC where a
"Default or Event of Default shall have occurred." Id.

All of AMC's payment and other obligations under the Loan
Agreement are secured by collateral in which FINOVA was granted a
first priority security interest (collectively, the "Collateral"),

1 including but not limited to the following:

- 2 A. All Receivables and Leases and all accounts,
3 chattel paper, instruments, contract rights
4 and general intangibles, all of [AMC's]
5 right[s], remedies, security, liens,
6 guaranties,...all deposits or other security
7 or support for the obligation of any Account
8 Debtor thereunder...;
- 9 B. All inventory, new or used, including parts
10 and accessories;
- 11 C. All equipment, new or used, including but not
12 limited to vehicles on lease or held for
13 lease and all parts and accessories;
- 14 D. All bank accounts of [AMC];
- 15 E. All monies, securities and property, now or
16 hereafter held, received by, or entrusted to,
17 in the possession or under the control of
18 [FINOVA] or a bailee of Lender;
- 19 F. All accessions to, substitutions for all
20 replacements, products and proceeds of the
21 foregoing, including, without limitation,
22 proceeds of insurance policies referenced in
23 [clause "A"] above (including but not limited
24 to claims paid and premium refunds); and
- 25 G. All books and records (including, without
26 limitation, customer lists, credit files,
27 tapes, ledger cards, computer software and
28 hardware, electronic data processing
29 software, computer printouts and other
30 computer materials and records) of [AMC]
31 evidencing or containing information
32 regarding any of the foregoing.

33 (Exbt. 102) at 8. On or about December 20, 1999, FINOVA, AMC and
34 Arledge, as custodian, entered into an Agency and Custodian
35 Agreement (the "Custodian Agreement"), which allowed Arledge, on
36 behalf of FINOVA, to retain physical possession of the car leases,
37 titles and other paper Collateral in which FINOVA was granted a
38 security interest. (Exbt. 109). In addition, on or about May 1,
39 2001, FINOVA, AMC and Arledge executed a document entitled
40 "Subordination and Standstill Agreement" (the "Subordination

1 Agreement"). (Exbt. 110). Under the Subordination Agreement, AMC
2 and Arledge agreed that (a) all indebtedness presently existing or
3 ever arising and owing from AMC to Arledge was subordinated to
4 FINOVA in all rights to payment and in all other respects and (b)
5 upon FINOVA notifying Arledge of a Default under the Loan
6 Agreement, Arledge would "hold all payments of principal and
7 interest received from [AMC] in trust for the benefit of [FINOVA]."
8 Id. at 1.

9 AMC's account was managed by FINOVA's Rediscount Division
10 located in Dallas, Texas. Jim Harris was the Account Executive
11 responsible for AMC's account in Dallas, Texas. Matt Hall and Brad
12 Fisher were the Portfolio Managers responsible for AMC's account in
13 Dallas, Texas. In or about late March to early April 2002, Harris,
14 Arledge, Jim Montgomery (AMC's accountant), Steven Thomas, Matt
15 Hall and Brad Fisher met at a Steak-n-Ale, a restaurant in Dallas,
16 Texas, to discuss matters relating to AMC's loan. During this
17 meeting, Arledge was informed that AMC's account was being
18 transferred to FINOVA's Chicago office. Ryan DeWitte became the
19 Account Executive responsible for AMC's account in Chicago. Steve
20 Narsutis was the Vice President/Division Manager of FINOVA's office
21 in Chicago.

22 **B. MNCFC Issue**

23 As stated previously, one of AMC's obligations under the Loan
24 Agreement (as set forth under the MNCFC) was to ensure that the
25 company maintained a positive cash flow position from month to
26 month. Based upon monthly financial statements provided by AMC,
27 FINOVA determined prior to May 7, 2002 that AMC was in violation of
28 the MNCFC for the months of February 2002 and March 2002. Narsutis

1 and DeWitte met with Arledge on or about April 22, 2002 at AMC's
2 car lot and informed him that AMC was in violation of the MNCFC.

3 On May 7, 2002, FINOVA sent to AMC a formal written notice
4 (the "May 7 Default Notice") that AMC had violated the MNCFC for
5 February and March 2002. The May 7 Default Notice also noted that
6 there was a violation of the MNCFC for January 2002, however FINOVA
7 later determined that there was no such violation. FINOVA further
8 indicated in the May 7 Default Notice that such Defaults would
9 mature into Events of Defaults ten days thereafter.

10 After AMC's receipt of the May 7 Default Notice, Arledge asked
11 Ryan DeWitte, of FINOVA, to send to AMC's accountant, Jim
12 Montgomery, a copy of FINOVA's calculation of the MNCFC violation.
13 On May 17, 2002, DeWitte sent by e-mail to Montgomery a spreadsheet
14 setting forth the calculations upon which the May 7 Default Notice
15 was based. Thereafter, there were a number of phone discussions
16 between DeWitte and Arledge with respect to the MNCFC issue. In one
17 such discussion, Arledge noted that FINOVA had made a mathematical
18 error in the calculations DeWitte had sent to him. DeWitte agreed
19 and thus determined that there was no violation of the MNCFC for
20 January 2002. However, violations still remained for February 2002
21 and March 2002.

22 Additionally, Arledge asked DeWitte if the money he invested
23 into AMC counted towards satisfaction of the MNCFC. DeWitte
24 acknowledged that such money invested did count towards
25 satisfaction of the MNCFC, however the money Arledge withdrew from
26 AMC also must be accounted. During this conversation, Arledge
27 asked what he could do to cure the default. DeWitte responded that
28 the default was not curable.

1 Between May 7, 2002 and May 17, 2002, Arledge called DeWitte
2 numerous times to discuss the MNCFC violation. During these
3 conversations, Arledge asserted that, according to his own
4 calculation, AMC was not in default. However, AMC refused to
5 provide such exonerating calculations to DeWitte for comparison.
6 Throughout the litigation of this lawsuit, Arledge and AMC
7 continued to refuse to provide such calculations based on attorney
8 client privilege and the work product doctrine.

9 In addition, during this time period Arledge offered to cure
10 the default, however FINOVA failed to give Arledge an amount of the
11 claimed violation. DeWitte continued to tell Arledge that the
12 violation was not curable. Arledge made no cash payment or offer to
13 make a cash payment into AMC to "cure" the cash shortfalls.
14 However, Arledge asserts that he called DeWitte everyday to request
15 the exact amount required to cure.

16 After the passage of the ten-day cure period, Arledge
17 submitted to FINOVA revised financial statements wherein AMC
18 reclassified certain entries in an attempt to change the MNCFC
19 computation. FINOVA disputed the accounting legitimacy of such
20 reclassifications, however, in any event, AMC was still in
21 violation of the MNCFC for February 2002 and March 2002 even if the
22 reclassifications were taken into account. AMC eventually reverted
23 to its original financial statements.

24 Jim Harris, AMC's accountant, reviewed the calculation of the
25 MNCF and discovered that a number for October 2001 had been
26 inputted incorrectly. As a result, AMC was not in default of the
27 MNCFC for the month of January 2002, and the numbers for the months
28 of February and March 2002 were reduced. Subsequently, DeWitte

1 reviewed the revised calculation of the MNCFC performed by Harris
2 and discovered additional errors in the calculation used to support
3 the May 7 Default Notice. However, the calculations still
4 indicated that AMC was in violation of the MNCFC for February 2002
5 and March 2002.

6 On or about September 2004, Arledge realized that the
7 calculation prepared by Harris indicating that AMC had violated the
8 MNCFC did not include cash receipts, such as AMC's late fees, NSF
9 fees, security deposits, and repossession fees. (Trial Transcript
10 for April 14, 2006) at 02:29:58PM-02:30:40PM. In April 2005,
11 Arledge conducted a final calculation of the MNCFC for the
12 contested time period. This calculation was ultimately provided to
13 FINOVA on May 6, 2005.

14 **C. Request to Sell Leases**

15 On or about May 20, 2002, Arledge requested that FINOVA allow
16 AMC to change its line of business from a used car dealership to a
17 new car dealership. By letter dated May 20, 2002, Arledge sought
18 permission from FINOVA to sell off enough of the leases comprising
19 FINOVA's collateral in order to (a) pay down the debt owing to
20 FINOVA and (b) generate cash to "purchase a new car franchise."
21 Specifically, Arledge stated,

22 I AM REQUESTING FINOVA TO ALLOW ME TO SELL SOME OR
23 ALL OF MY LEASES. THE MONIES GENERATED BY THIS
24 SALE WILL ENABLE ME TO PAY DOWN THE DEBT TO FINOVA
AND GENERATE CASH, WHICH WILL ALLOW ME TO PURCHASE
A NEW CAR FRANCHISE.

25 (Exbt. 125). Arledge maintains that this letter was a written
26 request for the exact amount that was needed to cure the Default.
27 It wasn't. FINOVA never responded to Arledge's request.

28 . . .

1 **D. AMC's Requested Loan Advance**

2 On June 20, 2002, AMC sent to FINOVA a Request for Advance
3 Form, requesting an advance under the Loan Agreement in the amount
4 of \$34,000 (the "Advance Request"). FINOVA responded to the
5 Advance Request the next day, on June 21, 2002. In its response,
6 FINOVA (a) confirmed the continued existence of one or more
7 Defaults or Events of Default under the Loan Agreement, (b) refused
8 to fund the requested advance as a result, and (c) requested access
9 to AMC on June 26, 2002 for an audit.

10 **E. Requested Audit and Interest Payments**

11 On June 26, 2002, AMC denied FINOVA's auditor access for the
12 audit, which FINOVA requested and scheduled in its letter dated
13 June 21, 2002. In response, FINOVA sent a letter to AMC's legal
14 counsel on June 26, 2002 (the "June 26 Default Letter"), advising
15 AMC that another Default had arisen under Section 3.6 of the Loan
16 Agreement as a result of AMC's failure to grant FINOVA access for
17 the audit. The June 26 Default Letter further advised AMC that
18 such Default would mature into an Event of Default in ten days if
19 FINOVA was not granted access for the audit. However, AMC did not
20 grant FINOVA access to conduct the audit. Consequently, the
21 Default arising from AMC's refusal to grant FINOVA access for the
22 audit matured into an Event of Default on July 6, 2002.

23 AMC did not make any payments of loan interest to FINOVA in
24 June, July or August of 2002 because it believed that FINOVA had
25 already materially breached the Loan Agreement. In July 2002,
26 Arledge took \$330,000 out of AMC for his own use. He withdrew an
27 additional \$469,000 in August 2002.

28 . . .

F. Filing of Lawsuit and Entry of First TRO

On July 12, 2002, FINOVA sent to Arledge a letter formally terminating the Custodian Agreement and demanding that Arledge immediately deliver to FINOVA that portion of the Collateral for which he had been entrusted as custodian. Arledge refused to deliver such collateral. On July 15, 2002, FINOVA filed in this action its Application for Temporary Restraining Order (With Notice) and Order to Show Cause (the "First TRO Application"). In the First TRO Application, FINOVA requested, among other things, that (a) AMC be enjoined from interfering with FINOVA's audit rights and (b) that Arledge be enjoined from interfering with FINOVA taking possession of that portion of the Collateral that had been entrusted to Arledge under the Custodian Agreement. On July 17, 2002, the Court entered its Temporary Restraining Order (With Notice) and Order to Show Cause (the "First TRO"). (doc. 5). Pursuant to the First TRO, FINOVA was required to post a security bond in the amount of \$25,000. Such bond was posted on July 19, 2002.

On July 26, 2002, FINOVA sent to AMC a notice of Default with respect to AMC's failure to cure the overadvance existing as of such date. AMC had failed to pay any overadvance payments after May 2002. Thereafter, on August 16, 2002, FINOVA sent to AMC a notice of Default with respect to AMC's failure to (a) cure the overadvance existing as of that date and (b) make its interest payments. On that same date, FINOVA also sent a separate notice to Arledge under the Subordination Agreement demanding that Arledge remit to FINOVA all payments which he had received from AMC in trust for the benefit of FINOVA. Arledge refused to make any

1 payments to FINOVA and, instead, made payments to his personal
2 creditors, including \$500,000 to his father, E.K. Arledge.

3 **G. FINOVA's Enforcement Efforts**

4 FINOVA pursued several enforcement options against AMC under
5 the loan agreement. First, FINOVA enforced its rights under
6 Section 3.9 of the Loan Agreement. On August 19, 2002, FINOVA made
7 a written demand upon AMC requesting that AMC deliver to FINOVA all
8 Collateral Proceeds thereafter received by or on behalf of AMC.
9 AMC refused to deliver such proceeds. Thus, on September 10, 2002,
10 upon application of FINOVA, the Court entered its Supplemental
11 Temporary Restraining Order (With Notice) and Order to Show Cause
12 (the "Supplemental TRO"). (doc. 23). Pursuant to the Supplemental
13 TRO, FINOVA was required to post a security bond in the amount of
14 \$25,000. Such bond was posted on September 12, 2002.

15 After a preliminary injunction hearing, the Court, in its
16 Preliminary Injunction dated September 27, 2002, continued the
17 Supplemental TRO, but increased the portion of the Collateral
18 Proceeds to be forwarded to FINOVA from 60% to 70%. (doc. 40).
19 Pursuant to the Preliminary Injunction, FINOVA was required to post
20 a security bond in the amount of \$100,000. Such bond was posted on
21 October 1, 2002.

22 Thereafter, FINOVA proceeded with a public UCC sale of its
23 remaining Collateral, pursuant to Section 7.4 of the Loan
24 Agreement. By written notice dated October 1, 2002, FINOVA
25 notified AMC and the Arledges that it intended to conduct a public
26 sale of the Collateral in accordance with the Loan Agreement and
27 the Uniform Commercial Code ("UCC"). FINOVA advertised the
28 scheduled UCC sale, and conducted the sale on October 28, 2002.

1 The Collateral was sold at the UCC sale pursuant to a credit bid of
2 \$2,009,605.58, leaving a deficiency principal balance of
3 \$1,665,193.30 owing under the Loan Agreement and Note, plus
4 interest accruing at the Stated Interest Rate.

5 **H. AMC's Search for New Financing and Claimed Damages**

6 After the loan with FINOVA ceased, AMC sought new financing
7 options. To aid this process, Defendants hired a broker to help
8 the company establish a new loan agreement. The brokerage contract
9 indicates that AMC was charged \$25,000 as a retainer fee for the
10 broker's services, and then charged an additional 3% of the amount
11 of the secured loan as a "success" fee. (Exbts. 238, 239). On May
12 22, 2003, AMC signed a new financing contract with Oak Rock
13 Financial, LLC, for a revolving loan in the amount of \$1,000,000
14 ("Oak Rock Financial Loan"). (Exbt. 237). Thus, in total, AMC
15 paid \$55,000 to the broker to locate the company's new financing
16 with Oak Rock Financial. (Exbt. 239). In addition, Oak Rock
17 Financial charged AMC an interest rate that was 4.75% higher than
18 that previously charged by FINOVA. (Exbt. 296) at 6.

19 As a result of FINOVA's foreclosure of AMC's assets and
20 collateral, AMC alleges that it was forced out of business, lost
21 the equity in its receivables, lost future profits, incurred
22 wholesale and make-ready losses, lost its "tracers" (or
23 "trackers"), and lost the use of its sales tax credits. Defendants
24 together claim that FINOVA's conduct forced them to hire a broker,
25 pay a fee to secure a new financing arrangement, and pay interest
26 in excess of the interest charged under the Loan Agreement.
27 Independently, the Arledges claim that FINOVA's conduct forced them
28 to sell their house for a loss of \$250,000.

1 **II. CONCLUSIONS OF LAW**

2 1. The Court has subject matter jurisdiction over this action
3 pursuant to 28 U.S.C. § 1332.

4 2. The Court has personal jurisdiction over all of the parties,
5 and venue is proper in this district.

6 **A. Conclusions of Law with Respect to FINOVA's Complaint**

7 3. The Loan Agreement is a valid and enforceable contract between
8 FINOVA and AMC. The Guaranty creates a valid and enforceable
9 obligation owing by the Arledges, jointly and severally, in favor
10 of FINOVA.

11 4. As found previously by the Court, the MNCFC under the Loan
12 Agreement is curable.

13 5. FINOVA has the primary obligation to monitor the MNCFC.
14 However, the Court concludes that there is no reason why Defendants
15 could not also monitor the MNCFC, and, indeed, Defendants have
16 conducted such monitoring and have the greatest access to the
17 documents needed to determine the status of AMC's net cash flow.

18 6. In any event, the nature of this breach by FINOVA was not so
19 fundamental to the contract to excuse Defendants from (1) granting
20 FINOVA access for a requested audit; (2) paying interest payments;
21 and (3) paying overadvance principal payments.

22 7. One or more Events of Default arose under the Loan Agreement
23 as a result of AMC failing to pay FINOVA interest in accordance
24 with the Loan Agreement since June 2002, and AMC failing to repay
25 to FINOVA the various loan overadvances.

26 8. One or more of these Events of Default arose under the
27 Loan Agreement as a result of AMC violating the MNCFC.

28 9. Defendants are estopped from asserting that, under a

1 recalculation of AMC's cash flow, Arledge was not in violation of
2 the MNCFC in February and March of 2002. Defendants are estopped
3 from making this assertion because they prevented FINOVA from
4 receiving and reviewing the information regarding the
5 recalculations.

6 10. The Court is not satisfied that any of the exhibits received
7 at trial establish that Arledge sought in writing the amount of
8 money needed to cure the MNCFC violation. One must greatly stretch
9 the language of Arledge's May 20, 2002 letter to DeWitte, stating
10 that AMC wanted to sell leases to "pay down the debt," to conclude
11 that AMC was requesting an amount to cure.

12 11. The Court is not satisfied that Arledge was credible when he
13 testified that he called DeWitte daily requesting a cure amount,
14 however the Court finds that Arledge requested such an amount at
15 least once.

16 12. The Court finds and concludes that, had FINOVA funded the
17 requested advance of \$34,000 (requested on or about June 20, 2002),
18 it would not have altered in any material way Defendants' ability
19 to pay the overadvances.

20 13. Thus, the Court concludes that FINOVA is entitled to the
21 unpaid amount of the debt, plus interest. The amounts owing to
22 FINOVA are as follows:

- 23 (a) principal amount of \$1,665,193.30;
- 24 (b) pre-judgment interest through April 30, 2004
in the amount of \$181,436.69;
- 25 (c) pre-judgment interest from April 30, 2004
through March 31, 2006 (at \$323.79 per day) in the
amount of \$226,653.00;
- 26 (d) pre-judgment interest after March 31, 2006
through the date of this order (at \$323.79 per
27 day); and
- 28 (e) post-judgment interest as set by the clerk
pursuant to 28 U.S.C. § 1961.

B. Conclusions of Law with Respect to Defendants' Counterclaim

14. FINOVA breached the Loan Agreement when (1) it did not allow AMC the opportunity to cure and (2) when it failed to give AMC an answer regarding its request to sell leases.

15. Defendants Richard and Peggy Arledge lack standing to assert any of the claims set forth in the Counterclaim. Defendants have provided no authority that indicates that, as guarantors, the Arledges possess the necessary standing to affirmatively assert a lender liability claim against FINOVA. Pursuant to the Guaranty, the Arledges are liable for the full amount of the deficiency owing by AMC. See Poling v. Morgan, 829 F.2d 882, 885 (9th Cir. 1987).

16. The Court determines that there was no bad faith claim asserted by Defendants, in the usual sense, and, in any event, concludes that there is no basis for a bad faith claim. Thus, Kurt Bloeser's testimony is irrelevant, as there was no tort claim asserted and, hence, there are no tort damages. FINOVA's oral motion to strike Bloeser's testimony shall be granted.

17. Defendants have no right to any punitive damages, as such damages are not an available remedy for a breach of contract claim. See Rhue v. Dawson, 841 P.2d 215, 227 (Ariz. App. 1992).

18. The Arledges, as guarantors, are not entitled to damages for the sale of their house.

19. The Court concludes that any damages due AMC shall only be calculated to the end of the FINOVA loan period, September 30, 2004.

20. AMC is entitled to the amount of damages incurred due to the difference in the interest rates imposed under the FINOVA loan and that imposed under the Oak Rock Financial Loan. These damages,

1 however, shall only be calculated from the date Arledge obtained
2 the Oak Rock Financial Loan, May 22, 2003, (Exbt. 237), to
3 September 30, 2004.

4 21. AMC is entitled to the cost of the finder's fee of \$55,000.00,
5 incurred when it sought a new loan.

6 22. AMC is entitled to the damages incurred due to lost tax
7 credits. The Court accepts Don Erickson's, Defendants' expert,
8 calculation on this issue, equaling \$301,260.00. (Exbt. 296) at 5.

9 23. AMC is entitled to a portion of the damages it claims with
10 regard to the "tracers." Not all of the 222 "tracers" that AMC
11 lost retained the same value, because each likely had a different
12 age and history of use. The Court concludes that AMC is entitled
13 to half of what it requests for the cost of the "tracer" devices,
14 valued at \$350 each, and half the claimed costs for installing and
15 monitoring the "tracers" for a total of \$58,275.00.

16 24. Lastly, but for the damages listed above, the Court finds that
17 there has been an insufficient showing that AMC suffered any lost
18 profits. Thus, AMC is not entitled to any damages for other
19 alleged lost profits.

20 IT IS ORDERED that plaintiff shall lodge a proposed form of
21 judgment, consistent with this order, within ten (10) days of the
22 entry of the order. The defendants, at their option, may lodge a
23 proposed form of judgment within the same 10 days. The Court

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1 encourages the parties to seek to agree as to the proposed form of
2 judgment.

3 DATED this 31st day of August, 2006.

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7 Robert C. Broomfield
8 Senior United States District Judge
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10 Copies to counsel of record.
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